
In The
Supreme Court of Virginia

RECORD NO. _____

CITY OF FALLS CHURCH, VIRGINIA,

Petitioner,

v.

**FAIRFAX COUNTY, VIRGINIA, and
BOARD OF SUPERVISORS OF
FAIRFAX COUNTY, VIRGINIA,**

Respondents.

**PETITION FOR THE CONVENING OF A SPECIAL COURT
TO THE HONORABLE LEROY ROUNTREE HASSELL, SR.**

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City's water supply system located in Fairfax County, Virginia and the actions of the County of Fairfax, Virginia to withhold its approval for the City to operate and expand its water system in the County. Under its Charter and the Virginia Code, the City is authorized to own and operate a water system inside and outside of its boundaries. For decades, with the consent of the County, the City has provided water service to customers within certain areas of Fairfax County. Despite its previous consent, the County has decided that it no longer wants the City to provide water service to some or all portions of Fairfax County now served by the City.

Since that decision, the County has withheld approval for the City to operate its water system in Fairfax County and the County is taking affirmative steps to prevent the maintenance, operation, and orderly expansion of the City's water system. Specifically, through legislative enactment and other means, the County has required, attempted to require, and intends to continue to require, properties in Fairfax County that are or can be serviced by the City's water system to connect to the Fairfax County Water Authority ("FCWA"). Such requirements have the direct effect of prohibiting property owners from connecting and/or reconnecting to the City's water system.

The County's actions to prevent the City from operating, maintaining, and orderly expanding its water system in Fairfax County is expressly prohibited by Virginia Code § 15.2-2143. That code section authorizes an aggrieved party, such as the City, to petition for the convening of a special court to redress a local governing body's action in withholding approval for another locality to operate and expand its water system in that locality. Pursuant to Virginia Code § 15.2-2137(C), once the special court is convened, the special court shall consider the necessity for and expediency of this proposed action and shall enter an order either: 1) dismissing this petition; or 2) granting the petition and identifying the terms and conditions for consideration of this matter.

For the reasons stated herein, pursuant to Virginia Code §§ 15.2-2143, -2135, and -2137(C), the City respectfully requests that the Chief Justice of the Supreme Court of Virginia convene a special court to consider this petition. Once convened, the City requests that the special court consider this cause and set forth the terms and condition upon which the petition is granted, as appropriate.

PARTIES

1. The City of Falls Church is a political subdivision of the Commonwealth of Virginia. The City has the constitutional, statutory, and charter right to purchase, condemn, acquire, manage, operate, maintain, and orderly expand water utility facilities, plants, and works both within and outside its territorial limits.

2. The County of Fairfax is a political subdivision of the Commonwealth of Virginia. The County does not provide public water service or operate a water system. The County is a political subdivision separate and distinct from FCWA.

3. The Board of Supervisors of Fairfax County is the legislative body of the County. The County and the Board of Supervisors of Fairfax County are referred to together herein as the County.

FACTS

4. In 1959, the City and FCWA entered into a thirty-year agreement (“Service Agreement”) that identified exclusive service areas for each entity to provide water service in Fairfax County.

5. Both the City and FCWA extended their water lines and infrastructure to the areas defined by the Service Agreement.

6. The City incurred considerable expense to construct, operate, and maintain its water system within its areas as defined by the Service Agreement.

7. The City's water system in Fairfax County existed prior to July 1, 1976.

8. During the time period governed by the Service Agreement, the County consented to the City's operation of its water system in Fairfax County.

9. After the period governed by the Service Agreement ended in 1989, the County continued to consent to the City's operation of its water system in Fairfax County.

10. Despite its previous consent and approval, the County has decided that it no longer wants the City to provide water service to some or all of the water customers of Fairfax County, Virginia to whom the City provides, or has provided, water service.

11. The County created a specific proffer to require developers of properties presently serviced by the City to connect to FCWA for water service.

12. The intended purpose of the specific proffer is to require property owners or developers in the County to discontinue receiving

service from the City's water system, even if the City has been servicing a property for decades.

13. DSF Long Metro II, LLC and DSF Long Metro III, LLC (collectively "Halstead Developer") sought to develop three parcels of land located in the Merrifield area of Fairfax County (collectively "Halstead Properties").

14. The City provided water service to the Halstead Properties; its waterline easements run through said properties. Specifically, the City provided: water service to Parcel 1 since July 23, 1979 and July 22, 1981; water service to Parcel 2 since March 20, 1969; and water service to Parcel 3 since December 7, 1970.

15. On October 20, 2006, the Halstead Developer submitted to the County an application to rezone the Halstead Properties.

16. The County required that the Halstead Developer proffer to connect to FCWA, thereby requiring that the Halstead Developer not connect to the City's water system and withholding approval for the City to operate and/or expand its water system in the County.

17. Pursuant Section 15.2-2303(A) of the Code of Virginia (1950, as amended) and Section 18-204 of the Zoning Ordinance of

Fairfax County (1978, as amended), the Halstead Developer agreed to the County's required water proffer, which states in relevant part:

B-44. Public Water. Water service to the [Halstead Properties] shall be provided by the Fairfax County Water Authority (FCWA), unless the FCWA determines service from another provider is necessary or preferable.

18. The Halstead Developers' proffers were approved by the County on October 15, 2007.

19. As contemplated by the County, FCWA has agreed to provide water service to the Halstead Properties.

20. On March 3, 2008, the City received and was requested by the County to approve Halstead Developers' site plan, and learned, for the first time, of the terms of Proffer B-44.

21. The City advised the Halstead Developers, among other things, that the City provided water service to the properties and was willing and able to serve the proposed development on the properties.

22. The County has refused to release the Halstead Developers from the terms of Proffer B-44 and is thereby refusing to allow the City to continue to service these properties and withholding approval for the City to operate and/or expand its water system in the County.

23. The City's water system is adequate and available to serve the water requirements of its present service area within the City and the County, including the Halstead Properties.

24. The provision of water service by FCWA to customers and areas within the County presently served by the City, including the Halstead Properties, will require the construction of duplicative and unnecessary utility facilities.

25. The construction of duplicative and unnecessary utility facilities by FCWA is, under the circumstances, contrary to public policy.

26. The County has sought proffers from other customers of the City where such proffers require the customers to connect to FCWA and thereby prohibit the customers from receiving or continuing to receive service from the City's water system.

27. The County's actions interfere with the City's statutory right to operate, maintain, and orderly expand its water system in Fairfax County.

28. Upon information and belief, the County will continue to require customers and properties presently serviced by the City to disconnect their water service from the City and to connect to FCWA.

29. The County, through its actions, has withheld approval for the maintenance, operation, and orderly expansion of the City's water system in Fairfax County.

30. The County's withholding of approval has caused, and will continue to cause both public entities to expend considerable time, effort, and expense to deal with these issues.

31. The County's withholding of approval is causing undue harm and expense to property owners in Fairfax County.

32. The County's withholding of approval creates: an inefficient use of public resources; a duplicative water supply system; confusion to citizens; and harm to the City's water system.

33. In December, 2008, FCWA brought suit in the Circuit Court of Fairfax County claiming, among other things, that the City's refusal to relocate its waterline easements at the Halstead Properties constituted a violation of the antitrust laws and otherwise attacking the constitutionality and legality of the City's public water services, rates, and charges relating to its public water service in Fairfax County (the "FCWA Fairfax Action").

34. The County and FCWA have agreed on the County's objective to force the City out of water service in some or all parts of

the County in which the City provides water service. The County supports FCWA in the FCWA Fairfax Action.

35. The FCWA Fairfax Action reflects the fact that the County has withheld and continues to intend to withhold approval for the City to operate and expand its water supply system in the County despite the City's efforts to secure such approval.

CAUSES OF ACTION

I

36. Petitioner repeats and re-alleges Paragraphs 1 through 35, above, as fully as though the same were set forth herein at length.

37. The County may not withhold approval of: the City's continued operation of a water system in Fairfax County; the City's continued provision of water service to customers and properties in Fairfax County; and the orderly expansion of the City's water service and water system in Fairfax County.

II

38. Petitioner repeats and re-alleges Paragraphs 1 through 35, above, as fully as though the same were set forth herein at length.

39. The City does not require the County's consent to provide water service to properties and customers in Fairfax County.

40. The County may not act to prohibit or attempt to prohibit: the City's continued operation of a water system in Fairfax County; the City's continued provision of water service to customers and properties in Fairfax County; and the orderly expansion of the City's water service and water system in Fairfax County.

III

41. Petitioner repeats and re-alleges Paragraphs 1 through 35, above, as fully as though the same were set forth herein at length.

42. The County gave express consent to the provision of water service by the City to properties and customers in Fairfax County.

43. By law, such consent cannot be revoked and the County may not interfere with: the City's continued operation of a water system in Fairfax County; the City's continued provision of water service to customers and properties in Fairfax County; and the orderly expansion of the City's water service and water system in Fairfax County.

IV

44. Petitioner repeats and re-alleges Paragraphs 1 through 35, above, as fully as though the same were set forth herein at length.

45. By its conduct, the County gave its implicit consent to the provision of water service by the City to properties and customers in Fairfax County.

46. By law, such consent cannot be revoked and the County may not interfere with: the City's continued operation of a water system in Fairfax County; the City's continued provision of water service to customers and properties in Fairfax County; and the orderly expansion of the City's water service and water system in Fairfax County.

PETITION FOR SPECIAL COURT

47. By its actions, the County is withholding approval, not consenting, and/or seeking to revoke its consent to: the City's continued construction of a system to provide water service in Fairfax County; the City's continued provision of water service in Fairfax County; the City's continued operation of its water system in Fairfax

County; and the City's continued orderly expansion of its water service in Fairfax County.

48. Said circumstances and actions of the County warrant the convening of a special court as provided by Va. Code § 15.2-2143.

49. Pursuant to Va. Code § 15.2-2137(C), once the special court is convened, the special court should determine the necessity for and the expediency of this proposed action.

50. The City asserts that the special court should grant a petition on this cause as: it is in the best interests of both political subdivisions of the Commonwealth; it prevents costly and time consuming litigation; it prevents undue harm to third party property owners; and it promotes the efficient use of public resources in providing a municipal service to the citizenry of this Commonwealth.

PRAYER FOR RELIEF

WHEREFORE, Petitioner:

1) respectfully requests that the Chief Justice of Supreme Court of Virginia designate a special court pursuant to Virginia Code § 15.2-2143 to be convened to consider the petition in the above stated cause;

2) respectfully requests that pursuant to Virginia Code § 15.2-2137(C), the special court determine the necessity for and expediency of this proposed action, and enter an order granting the petition as set forth herein;

3) in that cause, respectfully requests that the special court, as authorized by Virginia Code § 15.2-2136, balance the equities of this case, including the matters set forth in the FCWA Fairfax Action, and set forth what it deems fair and reasonable;

4) in that cause, respectfully requests that the special court enter judgment against the County and respectfully requests that the special court:

a) issue an order declaring that:

i) the City has the right to provide water service to the Halstead Properties;

ii) the City has the right to construct, maintain, operate, and orderly expand its water system in Fairfax County, including but not limited to its present customers and present service area;

iii) the County may not withhold consent or approval of the City's continued provision of water service to its present customers or properties in Fairfax County; and

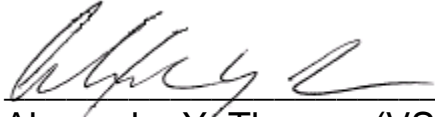
iv) the above-described Proffer B-44 is void *ab initio* and prohibited by law;

v) the County's practice of requiring and/or accepting proffers from developers that require a developer to connect to FCWA where the property to be developed is or can be serviced by the City constitutes the unlawful withholding of approval by the County of approval for the City to operate, and expand its water system in the County;

vi) that the City has engaged in no unlawful activity as claimed in the FCWA Fairfax Action.

b) provide such other and further relief as may be appropriate under the circumstances.

CITY OF FALLS CHURCH, VIRGINIA,
By Counsel



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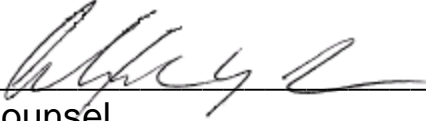
Attorneys for Petitioner

May 6, 2009

CERTIFICATE OF SERVICE

I certify that on the 6th day of May, 2009, a true copy of the foregoing was mailed, first-class postage prepaid, to:

David P. Bobzien, Esq.
County Attorney for Fairfax County
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Counsel